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No. 97-1072

In the Supreme Court of the United States

OCTOBER TERM, 1997

VIRGINIA STATE CORPORATION COMMISSION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. 276 grants the Federal Communications Commission statutory jurisdiction to address local coin payphone rates.

2. Whether the Commission's regulations concerning "public interest" payphones violate the Tenth Amendment.

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OPINION BELOW

The principal opinion of the court of appeals (Pet. App. 1-36) is reported at 117 F.3d 555. The supplemental opinion clarifying the decision is reported at 123 F.3d 693. The Report and Order and the Order on Reconsideration of the Federal Communications Commission are reported at 11 FCC Rcd 20541 and 11 FCC Rcd 21233, respectively.

JURISDICTION

The principal judgment of the court of appeals was entered on July 1, 1997. Petitions for rehearing were denied on September 16, 1997, and October 7, 1997 (Pet. App. 37-44). A motion for clarification was

granted on September 16, 1997. The petition for a writ of certiorari was filed on December 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, incumbent local exchange carriers (LECs) exercised a monopoly in the provision of payphone service in the United States. Technological and regulatory developments in the mid-1980's, however, made it possible for independent payphone service providers to offer competitive payphone services to the public. Until 1996, state public utility commissions exercised jurisdiction to regulate (or, in a few cases, to deregulate) the coin rate for local calls placed on any payphone, whether operated by a LEC or an independent payphone service provider. See Pet. App. 9; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, ¶¶ 57-58 (1996) (Order). Many States also established programs to ensure the availability of "public interest payphones" (*id.* ¶¶ 270-71, 277-80): *i.e.*, payphones "provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone," 47 U.S.C. 276(b)(2).

In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress substantially amended the statutory scheme, based on the original Communications Act of 1934, 47 U.S.C. 151 *et seq.*, governing the respective jurisdictional roles of the federal and state governments in regulating telephone service. With particular respect to payphones, Congress directed the Federal Communications Commission (FCC or Commission) to "pre-

scribe regulations that * * * establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation." 47 U.S.C. 276(b)(1)(A).[1] Congress also ordered the Commission to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments [then] in effect * * * and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues," 47 U.S.C. 276(b)(1)(B), and to determine "whether public interest payphones * * * should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably," 47 U.S.C. 276(b)(2). Congress explicitly provided that the Commission's regulations "shall preempt" any inconsistent state requirements. 47 U.S.C. 276(c).

2. a. After an extensive rulemaking proceeding, the FCC adopted regulations implementing Section 276. The Commission first determined that its statutory duty to ensure that payphone service providers (PSPs) are "fairly compensated for each and every completed intrastate and interstate call," 47 U.S.C. 276(b)(1)(A), necessarily required it to establish a compensation plan for local payphone calls. Order, ¶¶ 57-58. The adoption of such a plan, the FCC added, plainly requires the Commission to address local coin rates, because those rates are the means by which

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[1] The provisions of the 1996 Act have been codified in the 1996 Supplement to the United States Code.

PSPs are compensated for local coin calls. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, ¶ 57 (1996) (Reconsideration Order). The Commission rejected the claim that Section 2(b) of the 1934 Act, 47 U.S.C. 152(b), denies the Commission the authority to address those rates; in authorizing the Commission to ensure fair compensation for "each and every completed intrastate and interstate call," 47 U.S.C. 276(b)(1)(A), Congress had "squarely address[ed] the issue of interstate and intrastate jurisdiction," notwithstanding any contrary directive in Section 2(b). Reconsideration Order, ¶ 57. The Commission added that Section 276(c), which gives the Commission's regulations preemptive effect over inconsistent state requirements, "eliminates any question" of the Commission's authority in this area. *Ibid.*

On the merits, the Commission found that the state-regulated local coin rate in many locations had not provided PSPs with fair compensation. Order, ¶ 58. For example, the Commission noted that many States had placed caps on the local coin rates of all PSPs such that the costs associated with each call often exceeded the allowed charge. *Id.* ¶ 13; Reconsideration Order, ¶ 61. The Commission concluded that the best way to ensure that PSPs are "fairly compensated" is to permit the competitive market to set the price for each coin call. The Commission determined that "[c]ompetition over time will lead to the more efficient placement of payphones, improved payphone service, and lower prices for consumers." Order, ¶ 55. And the Commission found that allowing market forces to set compensation levels would best serve Congress's explicit mandate to "promote com-

petition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." Reconsideration Order, ¶ 50 (quoting 47 U.S.C. 276(b)(1)). The Commission therefore ordered the deregulation of coin rates (after a transition period), except where a state commission can demonstrate that a particular market failure requires continued regulation. Order, ¶¶ 58, 61.

In addition, the Commission found that certain non-pricing restrictions on payphones, such as state-imposed regulatory barriers to entry and exit, had impeded competition in the payphone marketplace. Order, ¶¶ 3, 59. For example, the Commission pointed out that some state commissions had precluded competition entirely by confining payphone service to incumbent LECs. *Id.* ¶ 13. To facilitate the development of a competitive payphone marketplace, the Commission exercised its preemption authority under Section 276 by directing the States to eliminate various kinds of anti-competitive regulations. *Id.* ¶¶ 58-60. The Commission made clear, however, that it was leaving intact state payphone regulations that do not contravene federal policy, such as rules that address possible market failures, ensure consumer access to price information, or protect the public safety and welfare. *Id.* ¶¶ 60-61; Reconsideration Order, ¶ 140 & n.433.

b. As required by Section 276(b)(3), the Commission also addressed the issue of "public interest" payphones. It first found that "there is a need to ensure the maintenance of payphones that serve the public policy interests of health, safety, and welfare in locations where there would not otherwise be payphones as a result of the operation of the market."

Order, ¶ 277. The Commission observed, however, that state commissions had traditionally overseen a variety of programs to encourage the deployment of public interest payphones tailored to local conditions. The Commission thus determined that state commissions occupy the best position to evaluate the need for public interest payphones in light of specific community needs. Order, ¶¶ 278, 280. At the urging of the state commissions (see *id.* ¶ 275), therefore, the Commission preserved a primary regulatory role for the States in this area, *id.* ¶ 280.

The Commission observed, however, that Congress had specifically required it, upon finding that public interest payphones are necessary, to "'ensure that such public interest payphones are supported fairly and equitably.'" Order, ¶ 283 (quoting 47 U.S.C. 276(b)(3)). To satisfy that responsibility, the Commission, among other things, directed each state commission to "review its rules and policies to determine whether it has provided for public interest payphones consistent with applicable Commission guidelines, evaluate whether it needs to take measures to ensure that such payphones will continue to exist in light of the Commission's implementation of Section 276 of the Communications Act, and administer and fund such programs so that such payphones are supported fairly and equitably." 47 C.F.R. 64.1330(c); see Order, ¶ 285. At no stage in the rulemaking proceedings did petitioners argue that this regulatory approach, designed to preserve state regulatory authority over public interest payphones to the extent consistent with the new federal statutory requirements, posed concerns under the Tenth Amendment.

3. On review, the court of appeals upheld the Commission's authority to address the issue of local coin

rates for payphones. Pet. App. 15-19.[2] The court explained that local coin calls indisputably fall within the Commission's authority under Section 276(b)(1)(A) to ensure fair compensation for "each and every completed intrastate and interstate [payphone] call." Pet. App. 17 (quoting 47 U.S.C. 276(b)(1)(A)). And the court found no plausible basis for suggesting that Congress intended to exclude local coin rates from the term "compensation" in Section 276. Pet. App. 17-18. To the contrary, the court observed, Congress had used the term "compensation" in other Sections of the Communications Act to include rates paid by consumers. *Id.* at 17 (citing 47 U.S.C. 203(c)(1), 226, 309(j)(2)(A)). Indeed, the court noted, except for subsidies contained in access charges paid to LEC-operated payphone providers, the coins deposited in payphones by consumers are the only compensation a PSP receives for a local call. *Ibid.* Thus, the court concluded, Section 276 unambiguously gives the Commission authority to regulate local coin rates, and that straightforward grant of authority overrides Section 2(b). *Id.* at 16-18.

4. Petitioners filed petitions for rehearing in the court of appeals, arguing—for the first time—that certain aspects of the Commission's regulations violate the Tenth Amendment. Pet. App. 90-119. The court denied those petitions without discussion. *Id.* at 37-40. On September 16, 1997, the court granted a motion for clarification of unrelated aspects of its opinion. 123 F.3d 693.

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[2] On the merits, the court of appeals vacated certain aspects of the Commission's payphone regulations on grounds unrelated to the issues raised in the present petition. Pet. App. 20-26, 31-36.

ARGUMENT

1. Petitioners first argue that Section 2(b) of the Communications Act of 1934 bars the Commission from implementing the newly enacted Section 276 by deregulating local coin rates for payphones. That argument is without merit, and it warrants no further review.

Section 2(b) provides that "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate matters. 47 U.S.C. 152(b). Even without an explicit amendment of Section 2(b) itself, the rule of construction set forth in that provision is inapplicable where Congress has "straightforward[ly]" subjected an area of intrastate telecommunications to federal regulation. *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 377 (1986); see also *id.* at 369 (the question is "whether Congress intended that federal regulation supersede state law"); Pet. 13 (acknowledging that, despite Section 2(b)'s rule against "constru[ing]" the Communications Act "to apply" to intrastate matters, Section 276 has some preemptive effect on state determinations concerning categories of services that must be provided without charge). Here, Congress has done precisely that: it has unambiguously directed the Commission "to prescribe regulations that * * * establish a per call compensation plan to ensure that all payphone service providers are fairly compensated *for each and every completed intrastate and interstate call* using their payphone," 47 U.S.C. 276(b)(1)(A) (emphasis added); and it has further specified that the Commission's implementing regulations "preempt" any inconsistent state requirements, 47 U.S.C. 276(c).

The Commission's statutory obligation to formulate a plan concerning "compensat[ion] for each and every completed intrastate * * * call" necessarily requires it to address the coin rates for such calls. 47 U.S.C. 276(b)(1)(A). With the exception of subsidies to LEC-operated PSPs—subsidies that, in Section 276(b)(1)(B), Congress ordered discontinued—the coins that consumers deposit into payphones are the *only* payment that PSPs receive for local coin calls. Pet. App. 17. Those coin payments fall squarely within the ordinary meaning of the term "compensation," see *Webster's Third New International Dictionary* 463 (1986) (defining term to include "payment for * * * service rendered"), and petitioners cite no basis for believing that Congress deviated from that ordinary meaning here. Indeed, as the court of appeals observed, "Congress has in fact used the term 'compensation' elsewhere in the Act in such a way so as to encompass rates paid by callers." Pet. App. 17 (citing 47 U.S.C. 203(c)(1), 226, 309(j)(2)(A)).

Petitioners contend that this Court's decision in *Louisiana* somehow forecloses the Commission's textually compelled reading of the later-enacted provisions of Section 276. That is incorrect. In *Louisiana*, this Court held that the Commission lacks authority under Section 220 of the Communications Act, 47 U.S.C. 220, to preempt certain state depreciation rules. The Court based its decision on the fact that, although Section 220 authorizes the Commission to prescribe depreciation rules, that provision does not clearly apply to intrastate matters and may have been "intended to do no more than spell out the authority of the FCC over depreciation in the context of interstate regulation." 476 U.S. at 377. In contrast, Section 276 explicitly authorizes the Com-

mission to regulate compensation for "each and every intrastate and interstate" payphone call, and it preempts state regulation that is inconsistent with the Commission's regulations implementing the statute. Section 276 thus grants the Commission the kind of "unambiguous" and "straightforward" authority that was absent in Section 220. *Id.* at 377.

Finally, it is unnecessary to hold this case pending this Court's decision in *FCC* v. *Iowa Utilities Board*, cert. granted, No. 97-831 (Jan. 26, 1998), and related cases. In *Iowa Utilities Board*, the Eighth Circuit expressed its agreement with the decision below and stated that, because Section 276 "directly requires the FCC to establish a compensation plan regarding both intrastate and interstate pay phone calls," it exemplifies Congress's ability to "open[] the gate in the 2(b) fence in order to grant the FCC intrastate rate-making authority." *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 797 (1997), cert. granted, *inter alia*, No. 97-831 (Jan. 26, 1998); see also *California* v. *FCC*, 124 F.2d 934, 941 (8th Cir. 1997) (reaffirming that Section 276 is "the type of straightforward and unambiguous grant of intrastate authority * * * * that overcomes Section 2(b)"), cert. granted, *inter alia*, No. 97-831 (Jan. 26, 1998) (consolidated with *Iowa Utilities Board*). Section 276 is not at issue in *Iowa Utilities Board*, and no party sought certiorari to challenge the Eighth Circuit's discussion of that provision. Instead, we and several other parties have challenged the Eighth Circuit's decision construing Section 2(b) to *restrict* the Commission's authority to address matters arising under other provisions of the 1996 Act. See 97-831 Pet. 17-22. It is exceedingly unlikely that this Court's resolution of that challenge would draw into question the D.C. Circuit's decision in this

case—cited approvingly by the Eighth Circuit itself, despite its broad view of Section 2(b)—to uphold the Commission's exercise of authority under Section 276.[3]

2. a. Petitioners also claim (Pet. 20-26) that the Commission's "public-interest payphone" regulations violate the Tenth Amendment.[4] That claim is not properly before this Court. Neither the Commission nor the court of appeals addressed any Tenth Amendment issue in this case, and that was no oversight: petitioners did not raise such a claim at any stage of these proceedings until their petitions for rehearing in the court of appeals. See Pet. 9-10. The Tenth Amendment claim that petitioners now raise is therefore doubly waived.

First, it is hornbook law that this Court will not entertain a petition for certiorari if, as is the case here, "the question presented was not pressed or

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[3] It is noteworthy that petitioners do not ask this Court to hold their petition pending resolution of *Iowa Utilities Board*, even as an alternative disposition. Petitioner Virginia State Corporation Commission is a respondent in that case, and it joined an opposition to the various petitions for certiorari in that case before it filed the petition in this case. See Jt. Br. in Opp. of State Commission Respondents, et al., Nos. 97-826, et al. (filed Dec. 18, 1997).

[4] Petitioners suggest, but do not clearly argue, that the Tenth Amendment bars the Commission from preempting state coin-rate regulation. See Pet. 21; see also Pet. 22 (citing Order, ¶ 59, which preempts certain state regulations that impair competition). There is no plausible basis for any such argument. The Tenth Amendment poses no obstacle to the authority of the federal government to preempt such state regulation. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-290 (1981); see also *City of New York* v. *FCC*, 486 U.S. 57 (1988).

passed upon below" by the court of appeals. *United States* v. *Williams*, 504 U.S. 36, 41 (1992); accord *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 237 (1990); *Brandon* v. *Holt*, 469 U.S. 464, 473 n.25 (1985). That principle applies, of course, to foreclose review of claims that a party failed to raise until the rehearing stage in the court of appeals. See, *e.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984); see also *Keating* v. *FERC*, 927 F.2d 616, 626 (D.C. Cir. 1991) (where a party "fail[s] to raise [its] argument until its petition for rehearing, the argument is waived"). For that reason alone, petitioner's Tenth Amendment claim is not properly presented for this Court's review.[5]

Second, that claim is barred for the independent reason that neither petitioners nor, to our knowledge, any other party raised it at any stage of the rulemaking proceedings before the Commission itself. Codifying general exhaustion principles, Section

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[5] Petitioners offer no explanation for their failure to raise any Tenth Amendment claim until the rehearing stage in the court of appeals, nor do they attempt to answer the obvious objection that they have waived that claim at two different stages of these proceedings. They do note that this Court decided *Printz* v. *United States*, 117 S. Ct. 2365 (1997), "just a few days before" the court of appeals issued its decision in this case. Pet. 24. But the issuance of new judicial precedent relevant to a claim does not excuse a party's prior failure to raise the claim itself, and, in any event, *Printz* adds very little to *New York* v. *United States*, 505 U.S. 144 (1992), as support for petitioners' argument. Finally, petitioners do not ask this Court to vacate the decision below and remand in light of *Printz*. We agree that, because petitioners waived their Tenth Amendment claim altogether, such a disposition would be inappropriate.

405(a) of the Communications Act, 47 U.S.C. 405(a),[6] "requires complainants, before coming to court, to give the FCC a fair opportunity to pass on a legal or factual argument." *American Scholastic TV Programming Found.* v. *FCC*, 46 F.3d 1173, 1177 (D.C. Cir. 1995). That statutory bar would foreclose judicial review of petitioners' constitutional claim even if they had timely raised it in the court of appeals. Moreover, the principles underlying the exhaustion rule apply with particular force here. Petitioners do not challenge Section 276 on its face; instead, they challenge the Commission's regulations implementing that provision. See, *e.g.*, Pet. 20. If petitioners had presented their Tenth Amendment concerns during the rulemaking proceedings, the Commission could have addressed those concerns and explained how it had taken them into consideration in designing its regulatory scheme, thereby "produc[ing] a useful record for subsequent judicial consideration." *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992). Because of petitioners' default, however, there is no such record and therefore no proper basis for judicial review.

b. The absence of any discussion of the Tenth Amendment issue in either the Commission's order or the court of appeals' decision—an absence created by petitioners' double default—compounds the difficulty of determining what precisely it is about the

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[6] Section 405(a) provides, among other things, that "[t]he filing of a petition for reconsideration [before the Commission] shall not be a condition precedent to judicial review of any such order, decision, report, or action, *except where* the party seeking such review * * * (2) relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass." 47 U.S.C. 405(a) (emphasis added).

Commission's order that, in petitioners' view, violates the Tenth Amendment. Section 276(b)(2), the validity of which petitioners do not challenge, broadly directs "the Commission," not the States, to "determine whether public interest payphones * * * should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably." 47 U.S.C. 276(b)(2). Despite the broad scope of that statutory directive, the Commission did not displace traditional state regulation of public-interest payphones with a comprehensive federal regulatory regime. Instead, at the urging of the States, the Commission preserved the broad discretion of the state commissions to continue regulating in that area and to choose from a broad variety of available funding mechanisms, some of which those commissions have themselves employed for some time at little or no cost to state treasuries. See, *e.g.*, Order, ¶ 279 (discussing existing California program, which "is funded by the payphone industry as a whole," and alternative approaches of other States, which "requir[e] LECs to provide at least one public payphone in each telephone exchange" or "requir[e] the placement of unprofitable payphones as part of contracts with PSPs for the placement of profitable payphones on public property") (footnotes omitted).

The Commission also left it to each state commission to determine, as a threshold matter, "whether it *needs* to take measures to ensure that [public interest] payphones will continue to exist." 47 C.F.R. 64.1330(c) (emphasis added); see Order, ¶ 285. At the same time, the Commission recognized its own explicit "responsibility under Section 276(b)(2) to 'ensure that such public interest payphones are supported fairly and equitably.'" Order, ¶ 286 (quoting

47 U.S.C. 276(b)(2)). It therefore authorized "interested parties" who believe that federal law has been violated in particular circumstances to "file a petition with the Commission asserting that [a] [S]tate is not providing for payphones in accordance with Section 276(b)(2) and the guidelines we adopt." *Ibid.*

Petitioners do not clearly explain why any particular aspect of that regulatory regime raises constitutional issues. The state commissions retain broad discretion to continue their various regulatory approaches in this area, subject only to the preemptive effect of federal law; and any given state commission may determine, in the first instance, that it does not even "need[] to take measures to ensure that such payphones will continue to exist." 47 C.F.R. 64.1330(c). Nothing in that regime "commandeers the legislative processes of the States," *New York*, 505 U.S. at 176 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)), or "conscript[s] the States' officers * * * to administer or enforce a federal regulatory program," *Printz* v. *United States*, 117 S. Ct. 2365, 2384 (1997). Instead, it requires state commissions to consider, and adhere to, federal law when addressing the subject of public interest payphones. As this Court's decisions make clear, the exercise of that preemptive authority is entirely consistent with the Tenth Amendment. See, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 759-770 (1982); *Hodel*, 452 U.S. at 289-293.[7]

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[7] Paradoxically, the practical upshot of petitioners' contrary argument is that, to avoid Tenth Amendment concerns, the Commission should have met its statutory duty to "ensure that * * * public interest payphones are supported fairly and equitably" (47 U.S.C. 276(b)(2)) by completely displacing the role of the state commissions in this area. But "it is a curious

Finally, even now petitioners have not clearly alleged how, in their view, the Commission's regulations have harmed them; in particular, they do not specifically identify any substantive regulatory burden that either Section 276(b) itself or the Commission's implementing regulations have compelled them to shoulder against their will. At bottom, their Tenth Amendment claim could amount to no more than a speculative assumption that, at some future date, the Commission will respond to "a petition * * * asserting that [a] [S]tate is not providing for [public-interest] payphones" (Order, ¶ 286), not by correcting the deficiency through substantive regulatory measures of its own, but by compelling the State to enter (or remain in) this regulatory field against its will and to assume particular substantive burdens that it does not wish to assume. Even apart from petitioners' double waiver of any Tenth Amendment claim, however, speculation about future implementation of an existing regulatory scheme does not present a justiciable case or controversy ripe for judicial review. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Article III requires allegation of injury that is "actual or imminent, not conjectural or hypothetical") (internal quotation marks omitted); *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) (discussing constitutional and prudential aspects of ripeness doctrine). Petitioners' belated attempt to reinvent this lawsuit is inappropriate for that reason as well.

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type of federalism that encourages [the federal government] to pre-empt a field entirely, when its preference is to let the States retain the primary regulatory role." *FERC*, 456 U.S. at 765 n.29.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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